

Respondent appeals and argues the ALJ exceeded his authority by refusing to consider the proffered evidence and address the issue of compensability.

Conversely, claimant argues the ALJ has the discretion to rule on the admissibility of evidence as well as to determine whether to re-litigate an issue previously decided. Consequently, claimant requests the Board to affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

At the preliminary hearing on March 1, 2006, respondent requested that the ALJ again consider whether the injuries claimant suffered arose out of and in the course of his employment. Respondent further requested that the ALJ consider depositions taken in a third party action regarding the incident. It appears from the proffer that some of the depositions were of the individuals who attacked claimant as well as other individuals' depositions which allegedly support respondent's contention the attack did not arise out of and in the course of claimant's employment.

The ALJ expressed concern that the proffered depositions were of witnesses not examined by counsel representing the claimant's workers compensation interests and because the issue of compensability had already been determined he decided not to take up that issue and deferred consideration until the regular hearing. Respondent then noted that claimant's attorneys representing his civil claims were present at the depositions.

In his Order the ALJ stated:

The court declined to take up the issue of injury arising out of and in the course of employment, which was addressed at a previous preliminary hearing. Additional evidence on the subject produced by the respondent did not appear necessarily probative of the compensability issue, and consisted of depositions of seven individuals who were not subject to examination by counsel representing either party's interests in this case. The court deferred re-examination of the compensability issue to the full hearing of this case, and noted the respondent's objection to being denied the opportunity to raise the compensability issue, and received the respondent's offer of proof on that issue.¹

An ALJ is not limited in the number of preliminary hearings that may be held in a case. It is within the sound discretion and authority of the ALJ to determine the number of preliminary hearings to be held and whether a prior preliminary hearing Order should be modified based on the evidence presented. Furthermore, the ALJ has the jurisdiction and authority to amend, modify and/or clarify a preliminary order as the evidence may dictate or as circumstances may require.

¹ ALJ Order (Mar. 2, 2006) at 1.

A preliminary hearing is a summary proceeding and a decision based upon the evidence presented at such preliminary hearing, whether rendered by an ALJ or the Board upon appeal from a preliminary hearing, is not binding upon the parties but subject to a full hearing on the claim.²

In this instance, the ALJ had already addressed the compensability issue in a previous preliminary hearing. At the March 1, 2006 preliminary hearing, claimant sought additional medical treatment as well as temporary total disability compensation. At that hearing the respondent sought to again raise the issue of the underlying compensability of the claim. The ALJ determined that because the issue had already been determined it would be best to defer further reconsideration of that issue until the regular hearing. As noted the ALJ has the discretion to determine the number of preliminary hearings that will be conducted as well as the admissibility of evidence. In this case, the ALJ deferred reconsideration of the compensability issue until the regular hearing and in so doing did not exceed his jurisdiction.

The Board's authority on review from preliminary hearings is limited to certain jurisdictional issues determined by the ALJ.³ The issues of claimant's entitlement to medical treatment and temporary total disability compensation do not raise jurisdictional issues for Board review from a preliminary hearing. Likewise, the ALJ's determination to defer again ruling on the compensability issue until the regular hearing did not exceed his jurisdiction and accordingly that determination does not confer jurisdiction for Board review from a preliminary hearing. Consequently, respondent's appeal is dismissed.

WHEREFORE, it is the finding of the Board that respondent's appeal is dismissed and the Order of Administrative Law Judge Kenneth J. Hursh dated March 2, 2006, remains in full force and effect.

IT IS SO ORDERED.

Dated this 30th day of June 2006.

BOARD MEMBER

c: Steven R. Jarrett, Attorney for Claimant
Donald J. Fritschie, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² K.S.A. 44-534a(a)(2).

³ *Id.*